

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GARY BRYNES	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1984.	:	

Petitioner, Gary Brynes, 1755 York Avenue, Apt. 9G, New York, New York 10128, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1984 (File No. 807441).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 24, 1990 at 1:15 P.M., with additional evidence submitted by December 5, 1990. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether penalties under Tax Law § 685(a) for late filing and late payment of income tax may be waived where the taxpayer filed for an automatic extension of time under Tax Law § 657(a) and 20 NYCRR 151.2, but had paid with the application or prior thereto only 70% of the tax as finally determined instead of the 90% as would be required by 20 NYCRR 151.8.

II. Whether there was reasonable cause and an absence of willful neglect so as to justify the waiver of the penalties under Tax Law § 685(a) for late filing and late payment of income tax when the amount of tax to be paid was dependent upon pending legislation which was retroactive.

FINDINGS OF FACT

Petitioner, Gary Brynes, in 1984, resided in New York at 440 East 62nd Street, Apt. 12-

A, New York, New York 10021. He had moved to New York from Maine at the end of 1982.

Petitioner was a 50% shareholder in Bryco, Inc. of 813 Washington Avenue, Portland, Maine 04103. That corporation is on a fiscal year ending March 31. It was a "subchapter S" corporation for Federal purposes.

On April 15, 1985, petitioner's accountants filed an Application for Automatic Extension of Time to File (Form IT-370). That application showed estimated New York State and New York City tax liabilities of \$4,894.00 and \$1,639.00, for a total of \$6,533.00. After withheld amounts totalling \$2,373.00, a tax due was shown of \$4,160.00. This was paid at that time.

The tax return as finally filed by petitioner showed a total tax due of \$9,101.43. After withheld amounts of \$2,373.00 and the April 15 payment of \$4,160.00, a net amount due of \$2,569.00 was shown and this was paid with the return on August 7, 1985.

(a) The Division of Taxation, by a statement dated October 15, 1985, calculated a penalty due for late filing and late payment of \$513.69 and interest of \$86.56. After showing an amount paid of \$.57, a net amount due of \$599.68 was shown.

(b) The penalty and interest was paid on or about October 31, 1985. A claim for refund was made at the same time.

(a) The claim for refund of penalties and interest is based upon the claim that petitioner's accountants, located in Portland, Maine, did not have sufficient information of New York legislation concerning subchapter S corporations and so could not make a closer estimate of tax than that which was made.

(b) Judicial notice is taken that in the spring of 1984, legislation was pending in the New York State Legislature in relation to the taxation of subchapter S corporations and that that legislation was to be applicable to taxable years beginning after December 31, 1982. This legislation was approved on July 27, 1984 and became chapter 606 of the Laws of 1984.

CONCLUSIONS OF LAW

A. The failure to secure an automatic extension of time to file a return does not preclude

the waiver of penalties for late filing and late payment of income tax. An automatic extension of time for filing a return may be secured under Tax Law § 657(a) and 20 NYCRR former 151.2 (which are similar to Federal provisions at IRC § 6081[a] and Treas Reg § 1.6081-4), but only when the application for such extension shows "the full amount" of tax due, which may be estimated, and the application is accompanied by the remittance of the amount thereof remaining unpaid. When the excess of the tax due as finally determined is over the amount paid with the application and is no greater than 10% of the tax due as finally determined it will be presumed that there is reasonable cause for the late filing and late payment of the tax (20 NYCRR former 151.8[b][2]; compare Treas Reg § 301.6651-1[c][3]). However, the same regulation makes clear that the late payment penalties and late filing penalties referred to "may be imposed...unless there can be shown reasonable cause for such late payment or late filing" (20 NYCRR former 151.8[b][1]). It is clear from this language that the failure of a taxpayer to meet the requirements for an automatic extension of time does not preclude the waiver of penalties. The Federal regulations are interpreted the same way (Hudspeth v. Commr., 51 TCM 175, 185-187; compare, Matter of John Grace & Co., Inc., Tax Appeals Tribunal, May 10, 1990).

B. The penalty imposed for late filing and late payment of tax in this case shall be waived. Such penalty imposed under Tax Law § 685(a) can be waived if it is shown that the failure to file and pay is "due to reasonable cause and not due to willful neglect...." The regulations of the Commissioner of Taxation and Finance under that section state that the grounds for reasonable cause include the "inability to obtain and assemble essential information... despite reasonable efforts" (20 NYCRR former 102.7[b][7]) and further include "any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay...and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes" (20 NYCRR former 102.7[b][10]). In this case, petitioner's accountant has explained that he could not get current information concerning the taxation by New York of subchapter S corporations. This is, of course,

completely understandable since proposed legislation would have made changes in such taxation and such changes would be retroactive to cover the year here in question. Under such circumstances, the accountant's delay in preparing final returns was at least a reasonable course of action. (The Division of Taxation at the hearing did not contest this issue at all.) I am aware that the last sentence of 20 NYCRR former 102.7(b)(10) states that "[i]gnorance of the law, however, will not be considered reasonable cause." However, the United States Supreme Court has stated that the "reasonable cause" language of the Federal delinquency penalty under IRC § 6651, which is identical with the language of Tax Law § 685(a), would absolve a taxpayer who relied on professional advice concerning substantive tax law even when that advice was wrong (cf. United States v. Boyle, 469 US 241; Estate of Paxton v. Commissioner, 86 TC 785, 819-820). The language of the regulation concerning ignorance of the law is therefore not justified by the statute and cannot be followed at least where, as in this case, the petitioner relied upon an accountant for tax advice.

C. The petition of Gary Brynes is granted and the Division of Taxation is directed to refund the amount of \$599.68 plus whatever interest may be lawfully due and owing.

DATED: Troy, New York

3/28/91

ADMINISTRATIVE LAW JUDGE